Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1818

BEACON NATIONAL INSURANCE COMPANY

AND

FIRST PREFERRED INSURANCE COMPANY,

Petitioners

V.

TEXAS STATE BOARD OF INSURANCE

and

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,

Respondents

Petition for Writ of Certiorari
to the Court of Civil Appeals
Third Supreme Judicial District
of Texas at Austin, Texas

JOE E. SHADDOCK
318 City National Building
Wichita Falls, Texas 76301
Attorney for Petitioners

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Constitutional, Statutory and Regulatory Provisions:

Fifth, Seventh, and Fourteenth Amendment to the United States Constitution

Article 21.49, Vernon's Annotated Texas Statutes

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Petition for Writ of Certiorari
to the Court of Civil Appeals
Third Supreme Judicial District
of Texas at Austin, Texas

The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered in the above case on May 30, 1979.

OPINION BELOW

The opinion of the District Court of Travis County, 53rd Judicial District, No. 260,154-A, is not reported but is contained in the Appendix attached hereto. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin is reported at 584 S.W. 2d 616.

JURISDICTION

The Judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas was made and entered on May 30, 1979 and copies of the Judgment and opinion are appended to this petition in the Appendix. After rendition of such Judgment and Opinion, the said Court of Civil Appeals denied Petitioners' Motion for Rehearing on June 20, 1979. The Texas Supreme Court denied Petitioners' Application for Writ of Error on December 19, 1979 and Petitioners' Motion for Rehearing on their Application for Writ of Error on February 20, 1980. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED

(1) Whether the State of Texas has denied Petitioners two inherent rights of the Fourteenth Amendment to the United States Constitution -- due process and equal protection -- by requiring Petitioners to submit to the Plan of Operation of the Texas Catastrophe Property Insurance Association while empowering private corporations composing the Board of such Association to structure the Plan so that the Board members have practically no liability while the small members, such as Petitioners, have more liability than their capital assets.

(2) Whether the State of Texas, through her legislature and courts may deny Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment and their constitutional right to a trial by jury in a dispute over management of an Association by (1) requiring Petitioners to be sub-

ject to an Association governed by the largest insurance companies in the country and (2) requiring Petitioners disputes be first brought before a state agency (Texas State Board of Insurance) and (3) then holding the substantial evidence rule applies to the hearing before the Board.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provisions are the Fifth, Seventh and Fourteenth Amendments to the United States Constitution. The principal statutory provision is Article 21.49, Vernon's Annotated Texas Statutes which is set out in the attached Appendix. In addition, the pertinent provision of the Plan of Operation of the Texas Catastrophe Property Insurance Association is set out in the attached Appendix.

STATEMENT

Petitioners are insurance companies doing business in the State of Texas. All insurance companies in the State of Texas writing windstorm insurance are required by Article 21.49, **Vernon's Annotated Texas Statutes,** to be members of the Texas Catastrophe Property Insurance Association (hereinafter called "Cat Pool"). Texas and other coastal states have formed such insurance pools to provide windstorm insurance coverage for catastrophes such as hurricanes which periodically devastate large sections of the coastal United States. The Texas Plan delegates the authority of the State to the Respondent Cat Pool which is governed by a Board of Directors composed of the largest insurance companies in the nation. The Board of Directors adopted a Plan of Operation which permits the Board members to avoid virtually all liability under the Cat Pool's insurance policies and assigned smaller companies such as these Petitioners far more potential liability than Petitioners' capital assets. The Cat Pool does not maintain any reserves and disburses to the member companies the annual premiums collected less any accrued losses for the particular plan year. The Cat Pool relies upon the capital assets of its member companies to pay losses in excess of the one year's premium held in reserve.

Accordingly, Petitioners and other companies similarly situated face confiscation of their capital assets upon a substantial hurricane loss to the Texas coast. Further, the insureds holding Cat Pool policies will not be able to be paid for their losses since the Cat Pool has no other reserves available with which to pay them. The Board of Directors on the other hand will emerge from such a catastrophe unscathed.

Texas' Article 21.49 requires Petitioners to be members of the Cat Pool and to submit any dispute first to the Texas State Board of Insurance and then to the Texas State District Court at Austin. Petitioners' request for a jury in the District Court was denied and the case was tried under the substantial evidence rule rather than the preponderance of evidence rule. The Texas Court of Civil Appeals held that the case was properly tried under the substantial evidence rule and that there was substantial evidence that the Plan of Operation was being operated fairly and in a non-discriminatory manner.

Petitioners raised the constitutional questions in their Petition filed in the State District Court at Austin and in their briefs filed in the Texas Court of Civil Appeals and in the Texas Supreme Court. See attached Appendix for Petitioners' petition filed in this cause.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case presents the issue of the right of the States under the 5th, 7th, and 14th Amendments to delegate to private industry the power of the State with no more guidance than that the power be exercised "fairly and non-discriminatorily". Virtually all coastal states have enacted legislation for the laudable purpose of providing insurance coverage to its citizens in coastal areas unable to obtain windstorm coverage. But if the plans can be structured to exempt from liability the class of large insurers governing

the plan and to place an insupportable burden of liability on that class of small insurers unable to sustain it then the net result is that the insureds will not be able to collect on their respective policies.

The problem has become worse as the population has grown and spread more and more areas close to the coast which have been developed for residential, commercial and entertainment purposes. As a consequence, hurricanes now extract a heavy toll in property damage and loss of life. Insurance companies faced with the probability of catastrophic losses have pulled out of high risk areas and refused to write policies in them. In order to provide windstorm protection to their people the states have enacted statutes attempting to provide such coverage through a state-required insurance plan in which all insurance companies doing business in the state are required to participate. If the insurance company participation were simply pro rata based on statewide writings of premium there probably would be no problem. However, the states have endeavored to encourage insurance companies to write in the affected areas voluntarily and have generally included some sort of credit provision so that companies writing voluntarily in the area may exempt themselves to that extent from the Plan. Where the management of the Plan is entrusted to the largest members of the insurance industry as in the present case the result promises bankruptcy for many members of the insurance industry and havoc for the insureds.

The Texas Plan is managed by the large insurers sitting as companies on the managing Board of Directors. The credit provisions in the Plan of Operation appear fair on their face and provide a dollar for dollar credit for insurance premiums voluntarily written by a company in the catastrophe area. In the real world however, insurance policies are subject to acceptance by mortgage lenders based upon company size not company quality. The standard rating is that contained in **Best's Key Rating Guide.** For instance, Petitioners have a rating of A/VII, the A classification meaning excellent quality and the Roman numeral indicating the financial size. The quality rating indicates the ability to pay claims while the

financial size merely indicates quantity of assets. It does not indicate the amount of assets above liabilities. Nevertheless, mortgage lenders accept or reject insurance policies based on the latter rating, that of financial size. Consequently, insurance companies with ratings of less than A/X are generally not acceptable by mortgage lenders. Since ours is a credit economy virtually all properties are subject to mortgages and the mortgage company rejections have effectively restricted Petitioners' efforts to avail themselves of the credit for voluntary writings.

Petitioners have made efforts to write voluntarily in the Catastrophe Areas but still receive Cat Pool participation of more than double their percentage of statewide writings (1.783% participation, .822% statewide premiums). Most of the large insurance companies do not write voluntarily in many parts of the catastrophe area while Petitioners write voluntarily in all areas. Further, Petitioner First Preferred Insurance Company offers a deviated (discounted) rate 20% less than the premium charged by other companies. Still the net effect is as stated, more than double Cat Pool participation than their statewide writings. Many smaller insurers face bankruptcy or liquidation because of their assignment of Cat Pool participation. Petitioners' portion of the projected loss exceeds their capital assets.

The Texas Coastal and Marine Council has estimated that another hurricane of the magnitude of Hurricane Carla in 1961 would, based on 1968 figures, amount to a wholesale construction cost of $849,000,000.00. When this figure is adjusted for retail and three years of inflation, the loss will approximate two billion dollars. The estimated loss to the Cat Pool would then be in the area of $500,000,000.00. The Cat Pool maintains no reserves and pays out the unexpended portion of collected premiums annually so as to maintain on hand only the current year's collected premiums for payment of such catastrophic losses.

The large insurers have structured the Plan so as to derive maximum benefit in the marketplace and avoid virtually all

Cat Pool liability exposure. This is illustrated by the following chart:

RATING	BOARD OF DIRECTORS	POOL PARTICIPATION	STATEWIDE PREMIUM WRITINGS
A+ XV	State Farm Insurance Company	-0-	6.353
A+ XIV	Republic Financial Services Group	-0-	3.998
A+ XV	Farmers Insurance Group	-0-	2.959
A+ XV	Continental Insurance Companies	-0-	4.955
A+ XV	U.S. Fire Insurance Company	-0-	1.835
A XII	Employers Mutual Casualty Company	-0-	.211
A+ XV	American General Fire & Casualty	1.534	3.152
A XV	Commercial Union Insurance Group	1.685	1.379
A+ IX	USAA	2.124	1.295
	Subtotal	5.343	26.137
	PAST OR RECENT BOARD OF DIRECTORS		
A XV	Aetna	-0-	5.16
A+ XV	Allstate	.212	3.42
A+ XV	Fireman's Fund	.004	2.84
A XIII	Hartford	.195	2.99
	Subtotal	.411	14.41
	Grand Totals	5.754	40.547

As the chart above shows, the present and recent members of the Board of Directors, and those with the greatest assets have strucured the Plan so that they escape liability exposure almost completely. Conversely, those companies with the bulk of the liability exposure do not have the capital assets with which to pay these losses. As a result, not only Cat Pool insureds along the coastal area but also other insureds of the affected companies will not be paid their losses.

It may be noted at this point that the resort to the Courts for relief from this oppression is a Sisyphean task. The exact percentages of Cat Pool participation change annually and

the Cat Pool can change the Plan of Operation any time a decision appears imminent. Since Petitioners filed their complaint in 1976, the exact participation figures have changed and in fact the Board has provided a minimum participation for all companies of 20% of their statewide writings and a maximum participation of 190%. Nevertheless, the basic effect is still the same in that the bulk of the Cat Pool liability exposure falls on those companies which do not have the capital assets to pay the losses. Petitioners' most recent participation has increased to 2.50%. In addition, the Texas legislature has adopted Section 19 of Article 21.49 to provide a tax credit for those companies which survive the assessment of Cat Pool losses. None of these acts will provide money with which to pay hurricane losses at the time the same are sustained.

Although the decision below was not based on federal grounds, this Court should inquire whether the decision rests upon a fair or substantial basis in order that Petitioners' constitutional guarantees may be appropriately enforced as this Honorable Court did in **Abie State Bank** v. **Bryan,** 282 US 765; 51 S. Ct. 252, 75 L. Ed 690; and in **Lawrence** v. **State Tax Commission,** 286 US 276; 52 S. Ct. 556; 76 L. Ed 1102. Further, as this Court stated in **New York Ex. Rel. New York & Q. Gas Company** v. **McCall,** 245 US 345; 38 S. Ct. 122; 62 L. Ed 337:

> "Although the Federal Supreme Court has no authority to substitute its judgment for that of an administrative body as to the wisdom or policy of an order complained of and will not analyze or balance the evidence which was before the Commission, it will enter upon such an examination of the record as may be necessary to determine whether there was such a want of hearing, or such arbitrary or capricious action on the part of the commission as to deny the invoked constitutional right to due process of law."

In the case at bar, the large insurance companies, using the power of the State of Texas, have placed many small insurance companies in the perilous position of being forced to

assume more in Cat Pool liability exposure than their capital assets and have so perverted the law as to effectively deny the insureds a right of recovery for their hurricane losses. Further, the large insurance companies stand to benefit by their arbitrary use of state power since the reduction of competition and anticipated increase of premiums to pay for catastrophic losses will result in windfall profits for the survivors.

2. The Supreme Court of the United States should expand the protection of the Fourteenth Amendment to include the rights granted under the Seventh Amendment. In this case there is hardly a doubt that a jury permitted to find facts under the preponderance of evidence rule would have found the Plan of Operation to be unfair and discriminatory in operation. It is inconceivable that a jury would permit a group of large insurance companies to use the power of the State to avoid payment of their fair share of liability for a devastating hurricane. Yet the Texas courts have held that the mere fact that disputes under Article 21.49 must first be taken to the Texas State Board of Insurance denies Petitioners the right to a trial by jury.

As this Honorable Court has held in **Codispotti** v. **Pennsylvania**, 418 US 506, 41 L. Ed 2d 912, 94 S. Ct. 2687:

> "The jury trial guarantee reflects 'a profound judgment about the way in which law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the government.' Duncan v. Louisiana, 391 US at 155, 20 L. Ed 2d 421 (footnote omitted). The Sixth Amendment represents a 'deep commitment of the nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement...' Id, at 156, 20 L. Ed 2d 491." (p. 921)

The reasons for applying the Fourteenth Amendment to include the jury trial guarantees of the Sixth Amendment are equally as strong for applying the same guarantee under the

Seventh Amendment. It is just as necessary to prevent oppresion by the govenment in a civil case such as the case at bar as in the contempt discussed in **Codispotti,** supra. It should be noted that a person accused of crime may be deprived of his life, liberty or property while a corporation faced with the loss of its entire capital assets is just as effectively being deprived of its life, liberty and property. It is just as necessary to provide for jury trial in the case at bar as a defense against arbitrary law enforcement as it was in the isolated Codispotti incident since hundreds of thousands of people are being effectively denied collectable insurance at the time when they will most need it.

It is one thing to delegate legislative authority to a state agency; it is another to delegate such authority to private industry. In the latter case no valid reason exists to deny the right of trial by jury.

Petitioners have no quarrel with this Court's holding in **Block** v. **Hirsch,** 256 US 135, 65 L. Ed 865, 41 S. Ct. 458, where this Court held jury trials would be incompatible with the whole concept of administrative adjudication. It is earnestly argued however that the operation of Respondent Cat Pool is nothing more than a corporate type association in the usual mold of management and members. It should be noted too that Article 21.49 creating such Association specifically envisioned trial de novo in the District Court by its provision that "the person aggrieved...may thereafter appeal to the District Court of Travis County, Texas and not elsewhere in accordance with Article 1.04 (f) of the Insurance Code of Texas." Article 1.04(f) has been held by Texas courts as requiring a trial de novo. See **Key Western Life Insurance Company** v. **State Board of Insurance,** 350 S.W. 2d 839 (Texas Sup. Ct.); **State Board of Insurance** v. **Professional and Businessmen's Insurance Company,** 359 S.W. 2d 312 (writ refused, no reversible error); and **USLIFE Life Insurance Company of Texas** v. **State Board of Insurance,** 527 S.W. 2d 204 (writ refused, no reversible error). Nevertheless, in the case at bar the Austin Court of Civil Appeals held by a tortured bit of reasoning that the agency action was legislative rather than adjudicatory. In fact the only agency

action in the case at bar was that of the State Board of Insurance sitting as a court of first resort as required by Article 21.49. It was the record made before the State Board of Insurance that the Court of Civil Appeals considered in finding "substantial" evidence to support the Texas State Board of Insurance ruling. Accordingly, there is, or should be, no question but what the case at bar does not involve administrative proceedings any more than do declaratory judgment actions, stockholder suits, or forcible entry suits.

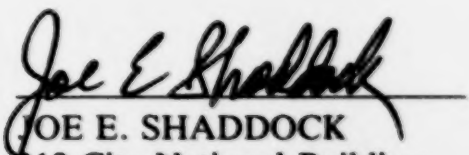
In short, the arguments for expanding the Fourteenth Amendment to include the jury trial guarantee are just as pressing and persuasive as in **Codispotti**, supra, but of wider scope.

There is probably no stronger argument in favor of extending the Fourteenth Amendment to include the Seventh Amendment than that the United States Supreme Court cannot, and should not rule on every case of arbitrary and oppressive governmental action. By requiring cases such as the one at bar to be submitted to a jury, the people themselves can correct the abuses and at an early stage.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,



JOE E. SHADDOCK
318 City National Building
Wichita Falls, Texas 76301

Counsel for Petitioners

PROOF OF SERVICE

I, Joe E. Shaddock, attorney for Beacon National Insurance Company and First Preferred Insurance Company, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of May, 1980, I served copies of the foregoing Petition for a Writ of Certiorari to the Court of Civil Appeals, Third Supreme Judicial District of Texas at Austin, Texas, on the parties thereto, as follows:

On the Defendants by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ms. Mary Joe Carroll, of the firm Clark, Thomas, Winters & Shapiro, P. O. Box 1148, Austin, Texas 78767, Attorney for Texas Catastrophe Property Insurance Association; and

To Mrs. Catherine Brown Fryer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Texas State Board of Insurance.

Joe E. Shaddock

JOE E. SHADDOCK

Attorney for Petitioners

318 City National Building
Wichita Falls, Texas 76301
Telephone: 817/723-4105

APPENDIX - 1

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED MAY 30, 1979

12,967 - **BEACON NATIONAL INSURANCE COMPANY, ET AL. V. TEXAS STATE BOARD OF INSURANCE, ET AL.**
APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY AFFIRMED - Opinion by Chief Justice Phillips

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment; IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby in all things affirmed. It is FURTHER ordered that appellants, Beacon National Insurance Company and First Preferred Insurance Company, as principal, and Fidelity and Deposit Company of Maryland, as surety on the appeal bond herein, pay all costs in this behalf expended and that this decision be certified below for observance.

APPENDIX - 2

**IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN**

NO. 12,967

**BEACON NATIONAL INSURANCE COMPANY,
ET AL.,**

APPELLANTS

VS.

**TEXAS STATE BOARD OF INSURANCE,
ET AL.,**

APPELLEES

**FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT NO. 260,154-A
HONORABLE HARLEY CLARK, JUDGE PRESIDING**

Appellants, Beacon National Insurance Company and First Preferred Insurance Company, contend that the Texas Catastrophe Property Insurance Association (commonly referred to as the Cat Pool) is not being operated fairly and in a non-discriminatory manner. Appellants have been unsuccessful before the Cat Pool Board of Directors and in appeals to the State Board of Insurance and district court of Travis County. Appellants have now perfected their appeal to this Court.

We affirm.

The Cat Pool was created by Texas Insurance Code Ann. art. 21.49 (Supp. 1978). Its membership consists "of all property insurers authorized to transact property insurance in this State, except those companies that are prevented by law from writing coverages available through the pool on a Statewide basis." *Id.* § 4(a). The purpose of the enactment is

to provide insurance for property owners in the "Catastrophe Area" of Texas where hurricane risk is great. The State Board of Insurance has determined that the catastrophe area is comprised of the first tier of counties along the Gulf coast.

Member insurance companies are assigned a percentage share of expenses, profits and losses of insurance written by the Cat Pool based upon the total amount of premiums written by the member in Texas. Members of the Cat Pool are "entitled to receive credit for similar insurance voluntarily written in the area designated by the Board (the Gulf coast counties) and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation." *Id.* § 5(c).

The plan of operation of the Cat Pool was required by the statute to be prepared by a temporary board of directors of the Pool, appointed by the State Board of Insurance. The permanent board of directors is elected in the manner set out in the plan of operation. Each one of five directors is chosen from one of five different insurance organizations. The remaining four directors are elected at large from the overall membership of the Cat Pool. It is important to note that the plan of operation of the Cat Pool was approved by the State Board of Insurance.

Appellants' complaint in this case is that the Cat Pool is being administered unfairly and discriminatorily. It is appellants' contention that this is shown by the fact that the very large member companies that have representatives on the board of directors have almost a zero percent participation in Cat Pool insurance writings. The reason these companies have such a low percentage share is because they avail themselves of the authorized credit for insurance voluntarily written in the catastrophe area. Appellants point to two actions that would remedy the alleged discriminatory operation of the Cat Pool, namely, reduction of the size of the catastrophe area or a reduction of the credit for voluntarily written insurance in the catastrophe area to something less than a dollar-for-dollar credit.

"Catastrophe Area" is defined to mean a city or county in which windstorm and hail insurance "is not reasonably available to a substantial number of owners of insurable property ..." Tex. Rev. Civ. Stat. Ann. art. 21.49 § 3(h) (Supp. 1978). This determination is made by the State Board of Insurance, not the Cat Pool or its board of directors. In addition, the designation of the catastrophe area may be revoked by the State Board of Insurance. The Cat Pool may also make a determination that "insurance is no longer reasonably unavailable" and it may then request the State Board to revoke the designation. *Id.* Appellants contend that the Cat Pool's failure to make such a request amounts to arbitrary and discriminatory conduct with respect to appellants. The only evidence offered by appellants to show that property insurance in any cities or counties within the catastrophe area is now readily available is the fact that Nueces and Jefferson Counties together account for only twenty percent of the writings of the Pool.

The basis for appellants' complaint is, apparently, that the larger insurance companies, which are represented on the board of directors of the Cat Pool, are able to write many more voluntary insurance policies in the catastrophe area than are appellants. These larger insurers are thereby able to select better property risks and at the same time reduce participation in the Cat Pool with its poorer risk policies. Appellants' argument is that the Cat Pool board of directors is acting unfairly by not taking steps to offset this advantage of the larger insurance companies.

It is obvious that the advantage results from the statutorily authorized credit for voluntary insurance. Appellants insist that they are precluded from benefiting from the credit because mortgage lenders will not accept insurance written by appellants. This is so, they claim, because their financial rating is not as high as the other larger insurers. We do not believe this of itself is sufficient to prove that the Cat Pool is being operated unfairly. The large insurers' representatives on the Cat Pool board of directors are not obligated to make changes in the Cat Pool's operation simply because they are able to benefit from the credit provision of the statute.

Furthermore, appellants' witnesses testified that mortgage lenders in the catastrophe area do in fact accept insurance written by appellants. An independent insurance agent in Galveston County could think of only one mortgagee who refused to approve appellants. A Beaumont agent testified that she did a substantial volume of business for appellants. A director of Beacon National stated that mortgage lenders refuse to use appellants' policies but that the problem is statewide and not limited to the catastrophe area. Finally, the executive vice-president of appellants testified that probably fifty percent of mortgage lenders would accept appellants' policies in the catastrophe area.

We hold that there was substantial evidence to uphold the agency action.

Appellants contend in their second point of error that the trial court erred in holding the substantial evidence rule applied in this case. The contention is based primarily on the fact that the manner of review provided by statute, Tex. Ins. Code Ann. art. 1.04(f) (1963), is by trial *de novo* and the substantial evidence rule, applied by the trial court, was expressly inapplicable. Resolution of this issue involves consideration of the doctrine of separation of powers.

The Texas Constitution provides that the powers of government shall be divided into three distinct departments: legislative, executive and judicial, and that except in instances expressly permitted by the Constitution, "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others. ..." Tex. Const. art. II §1. Pursuant to this provision, legislative acts requiring judicial review of legislative or executive determinations of agencies by way of a trial *de novo* have been declared unconstitutional. Key Western Life Insurance Company v. State Board of Insurance, 350 S.W. 2d 839 (Tex. 1961). In other words, if a court reviews such agency action *de novo,* under the preponderance of the evidence rule, the court trespasses on that area of our government reserved to the legislature.

We must, therefore, decide in this appeal whether appellants' lawsuit involves the exercise of a legislative or

judicial function by the agency. "The action of an administrative body or officer is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule-making action, general and future in effect." *Id. at* 847. A major consideration in making the necessary determination is whether the agency's action concerns only the parties who are immediately affected or a wider group of those subject to the authority of the agency or even the public as a whole. Texas State Board of Health v. Harrison Clinic Hospital, 410 S.W. 2d 181 (Tex. 1966); Scott v. Texas State Board of Medical Examiners, 384 S.W. 2d 686 (Tex. 1964); Chemical Bank and Trust Company v. Falkner, 369 S.W. 2d 427 (Tex. 1963).

In our case appellants challenge the designation of the catastophe area and the credit for voluntarily written insurance, both of which have a much broader application and effect than upon appellants' business. As a result, we conclude that the question is legislative in nature, and, as Article 1.04(f) requires a *de novo* review on appeal to the courts, if applied in this case, it would violate Tex. Const. art. II, § 1. The proper judicial review is under the substantial evidence rule, as the trial court correctly held. See Davis v. City of Lubbock, 326 S.W. 2d 699 (Tex. 1959); Farmers and Merchants Insurance Company v. State Board of Insurance, 321 S.W. 2d 354 (Tex. Civ. App. 1959, writ ref'd n.r.e.).

The judgment of the trial court is affirmed.

John C. Phillips, Chief Justice

Affirmed
Filed: May 30, 1979

APPENDIX - 3

Article 21.49 Vernon's Annotated Texas Statutes

Sec. 5 (b) On or before 10 days after the effective date of this Act the Board shall appoint a temporary board of directors of the Association which shall consist of seven representatives of members of the Association, selected so as to fairly represent various classes of member insurers. Such temporary board of directors shall prepare and submit a plan of operation and shall serve until the permanent board of directors shall take office in accordance with said plan of operation.

(c) All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premiums of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as furnished to the Association by the Board after review of annual statements, other reports and other statistics the Board shall deem necessary to provide the information herein required and which the Board is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall, in accordance with the plan of operation, be entitled to receive credit for similar insurance voluntarily written in the area designated by the Board and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation. Each member's participation in the Association shall be determined annually in the same manner as the initial determination. For purposes of determining participation in the Association, two or more members having a common ownership or operating in this State under common management or control shall be treated as if they constituted a single member. Any insurer authorized to write and engaged in writing any insurance, the writing of which required such insurer to be a member of the Association, who becomes authorized to engage in writing such insurance after the effective date of this Act shall become a member of the Association on the 1st day of

January immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association.

(d) On or before 45 days after the effective date of this Act, the temporary board of directors of the Association shall submit to the Board for review and approval a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors and shall provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation, the establishment of necessary facilities, management of the Association, plan for assessment of members to defray losses and expenses, underwriting standards, procedures for the acceptance and cession of reinsurance, procedures for determining the amount of insurance to be provided to specific risks, time limits and procedures for processing applications for insurance, and for such other provisions as may be deemed necessary by the board of directors and the Board to carry out the purposes of this Act. The proposed plan shall be reviewed by the Board and approved, unless it finds that such plan does not properly fulfill the purposes of this Act. In the review of the proposed plan the Board may, in its discretion, consult with the directors of the Association and may seek any further information which it deems necessary for a decision. If the Board approves the proposed plan, it shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Board disapproves all or any part of the proposed plan of operation, it shall return the same to the directors with its written statement setting forth the reasons for the disapproval and any recommendations it may wish to make. The directors may alter the plan in accordance with the recommendations of the Board or shall, within 15 days from the date of disapproval, return a new plan to the Board. In the event the Association has not proposed a plan satisfactory to the Board on or before the 14th

day of May, 1971, the Board shall certify and adopt a plan under which the Association shall operate.

The Directors of the Association may, subject to the approval of the Board, amend the plan of operation at any time.

In the absence of an appeal, the Association shall adopt amendments to the plan proposed by the Board within 30 days.

Appeals

Sec. 9. Any person insured pursuant to this Act, or his duly authorized representative, or any affected insurer who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such act, ruling or decision, appeal to the Board. In the event the Association is aggrieved by the action of the Board with respect to any ruling, order, or determination of the Board, it may, within 30 days after such action, make a written request to the Board for a hearing thereon. The Board shall hear the Association, or the appeal from an act, ruling or decision of the Association, within 30 days after receipt of such request or appeal and shall give not less than 10 days' written notice of the time and place of hearing to the Association making such request or the person, or his duly authorized representative, appealing from the act, ruling or decision of the Association. Within 30 days after such hearing, the Board shall affirm, reverse or modify its previous action or the act, ruling or decision appealed to the Board. Pending such hearing and decision thereon, the Board may suspend or postpone the effective date of its previous rule or of the act, ruling or decision appealed to the Board. The Association, or the person aggrieved by any order or decision of the Board may thereafter appeal to the District Court of Travis County, Texas, and not elsewhere, in accordance with Article 1.04(f) of the Insurance Code of Texas.

APPENDIX - 4

Texas Catastrophe Property Insurance Association
Plan of Operation

ARTICLE II
ASSESSMENT OF MEMBERS

Section 1 - Assessment.

If the Chairman of the Board of Directors or any members of the Board of Directors determine that an assessment of the members is necessary, a special meeting of the Board of Directors shall be called to determine if the funds then available to the Association are:

A. of insufficient size to provide adequately for the operating expenses of the Association for the remainder of the then existing fiscal year of the Association (or if such special meeting is within sixty (60) days of the end of the then fiscal year, the Board of Directors may also determine if the funds available to the Association during the next fiscal year will be insufficient to adequately provide for the operating expenses of the Association for the next succeeding fiscal year); and/or

B. of insufficient size to adequately provide for an existing catastrophe loss or losses.

If the Board of Directors shall determine funds available to the Association are of insufficient size under the provisions of Section A and/or B, then it shall assess the members of the Association in such amount as it shall deem reasonable and necessary to provide for such operating expenses and/or such catastrophe loss or losses.

Section 2 - Amount of Assessment.

A. The Board of Directors shall determine which members of the Association shall participate in any assessment for operating expenses and/or catastrophe losses. This determination shall be computed on a syndicate year basis rather than on a calendar year basis. The designated members of the Association shall participate in any assessment

levied in the proportion that the net direct premiums (excluding premiums on property of the State of Texas, any city, political subdivision, or agency of the State) of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums (excluding premiums on property or the State of Texas, any city, political subdivision, or agency of the State) written in this State by all members of the Association as furnished to the Association by the Board after review of annual statements, other reports, and required statistics; provided, however, that if at the time of such assessment the Board has not furnished to the Association information necessary to compute a member's participation during the preceding calendar year then each member's participation shall be based upon information furnished to the Association from the last calendar year in which such information is available and, upon obtaining the necessary information from the Board the Association shall reassess or refund to each member such amounts as are necessary to properly reflect such member's participation; provided, further, that a member shall be entitled to receive the following credit for insurance, similar to catastrophe insurance, written in such catastrophe area:

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION

PROCEDURE FOR DETERMINING THE PERCENT PARTICIPATION FOR MEMBERS OF THE TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION REFLECTING CREDIT FOR VOLUNTARY PREMIUMS WRITTEN IN THE DESIGNATED AREA.

ALL PREMIUMS ARE FOR IMMEDIATELY PRECEDING CALENDAR YEAR ENDING DECEMBER 31ST.

PART 1

Column 1(a) Statewide direct written premiums for extended coverage from Texas Special Page 14 - Column 1, Line 2. Premiums written by the Oil Insurance Association are deducted and replaced by each member company's actual quota share.

Premiums on public properties, as well as, assumed premiums written by TCPIA are excluded.

Column 1(b) Statewide direct written premiums for homeowners from Texas Special Page 14 -Line 4 and Line 27 combined.

Column 2 The sum of the Statewide direct written premiums at 90% of the extended coverage and 30% of the homeowners. (90% Column [1] (a) + 30% Column [1] (b)).

Column 3 Percentage of the total Statewide direct written premiums, described in Column [2], attributable to each member company and is the basis for indicating normal required participation in the Texas Catastrophe Property Insurance Association prior to credits for voluntary writings in the designated area.

Column 4 Total windstorm and hail premiums in the designated area (from Part III - Column [3]).

Column 5 Normal company quota of total windstorm and hail premiums:

Voluntary premiums written in designated area (X 1.0) Plus (+) association premiums at Association rates.

Amounts are determined by applying the percentages in Column [3] to the estimated wind and hail premiums designated areas - Column [4].

Column 6 Each company's voluntary windstorm and hail writings in the designated area (from Part II, Column [2]).

NOTE: Maximum credit shall be limited to company's normal quota.

Column 7 — Each company's relative quota after applying credits for voluntary writings (Column 5 minus Column 6). Disregard any negative premium quota.

NOTE: Offset figure is the total of the excess credits developed by maximum credits in Column [6].

Column 8 — Percentage participation of each member company in the Texas Catastrophe Property Insurance Association, prior to elimination of percentage for offset.

Column 9 — Final percentage participation of each member company in Texas Catastrophe Property Insurance Association.

PART II (PREMIUMS IN DESIGNATED AREA ONLY)

Column 1 (a) — Extended coverage direct written premiums on properties located in the *Beach & Coastal areas* as defined in the T.C.P.I.A. Manual.

Column 1(b) — Homeowners direct written premiums on properties located in the *Beach & Coastal areas* as defined in the T.C.P.I.A. Manual.

Column 2 — The sum of the extended coverage and homeowners premiums in Column 1 (a) and 1 (b) adjusted to reflect wind and hail only.

PART III TOTAL WIND AND HAIL PREMIUM IN THE DESIGNATED AREA:

Voluntary premiums written in designated area plus (+) Association premiums at Association rates.

The total amount column [3] is brought forward to Part I - Column [4], and is distributed among companies in direct proportion to their combined net premium subject to quota of extended coverage and homeowners as it relates to the total of all member companies.

APPENDIX - 5

AMENDMENT TO THE PLAN OF OPERATION OF THE TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION

Effective January 1, 1978
I.

Delete in its entirety the following language in Part one, Article I, Section 2, I:

"I. "Net Direct Premiums" means the sum of:

(1) 90% of the Gross Direct written premiums on the extended coverage line of business as reflected on line two of the insurer's last annual statement, and

(2) 30% of the Gross Direct written premiums on the sum of:

(a) The Homeowner's Multiple Peril Fire and Allied Portion Line of business as reflected on line four of the insurer's last annual statement, and

(b) The Homeowners' Multiple Peril Casualty Portion Line of business as reflected on line twenty-nine of the insurer's last annual statement."

and insert in lieu thereof the following language:

"I. "Net Direct Premiums" means the sum of the following premiums:

(1) 90% of the Direct written premiums on the Extended Coverage line of business as reflected on line two column (1) of the insurer's last annual statement.

(2) 90% of the Extended Coverage portion of the Direct written premiums on the Multiple Peril line of business as reported on line eight column (1) of the insurer's last annual statement, and

(3) 40% of the Direct written premiums on the Homeowners' Multiple Peril line of business as reported on line four column (1) of the insurer's last annual statement."

II.

Add the following language at the end of Subparagraph A of Section 2 of Article II of Part Three of the Plan of Operation of the Texas Catastrophe Property Insurance Association immediately following the words "written in such catastrophe area,"

"except that in no event shall the final percentage of participation after application of credit for voluntary writings in the catastrophe area be less than 20% nor more than 190% of the company's percentage of statewide windstorm and hail premiums modified by applicable offset factors."

III.

Delete in its entirety page 20 of the Plan of Operation of the Texas Catastrophe Property Insurance Association and in lieu thereof substitute new page 20 as follows:

Texas Catastrophe Property Insurance Association

PROCEDURE FOR DETERMINING THE PERCENT OF PARTICIPATION FOR MEMBERS OF THE TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION REFLECTING CREDIT FOR VOLUNTARY PREMIUMS WRITTEN IN THE DESIGNATED AREA.

ALL PREMIUMS ARE FOR MOST RECENT PRECEDING CALENDAR YEAR ENDING DECEMBER 31ST.

Column 1(a) Statewide direct written premiums for extended coverage from Texas Annual Statement Page 14, Line 2, Column (1).

Column 1(b) Statewide direct written premiums for the extended coverage portion of the multiple peril line from Texas Annual Statement, Page 14, Line 8, Column (1).

Column 1(c) Statewide direct written premiums for homeowners and farm and ranchowners from Texas Annual Statement, Page 14, Line 4, Column (1).

Column 2 The sum of the Statewide direct written premiums at 90% of the extended coverage and 40% of the homeowners. (90% Column [1] (a) + 90% of Column [1] (b) + 10% Column [1] (c).

Column 3 Each company's percentage of the net direct premiums as described in Column [2], which is the basis for indicating normal required participation in the Texas Catastrophe Property Insurance Association prior to credits for voluntary writings in the designated area.

Column 4 Total windstorm and hail premiums in the designated area (TCPIA premiums plus voluntary premiums).

Column 5 Normal company quota of total windstorm and hail premiums: Column [3] X Column [4].

Column 6 Each company's voluntary writings in the designated area multiplied by the same percentages as shown in Column [2] above.

NOTE: Maximum credit shall be limited to company's normal quota.

Column 7 Each company's maximum possible allocation after applying credits for voluntary writings (Column 5 minus Column 6). Negative allocation to be shown as zero.

Column 8 Percentage participation of each member company in the Texas Catastrophe Property

Insurance Association, prior to application of offset.

NOTE: The offset figure measures the excess premiums developed by maximum credits in Column [6].

Column 9 — Percentage participation of each member company in Texas Catastrophe Property Insurance Association prior to application of minimum-maximum factors.

Column 10 — Assignment after application of 20% minimum or 190% maximum of Column [3].

Column 11 — Net assignment in association. (After application of offset following minimum-maximum limitations.).

APPENDIX - 6

NO. 260,154

BEACON NATIONAL INSURANCE COMPANY AND FIRST PREFERRED INSURANCE COMPANY

VS.

TEXAS STATE BOARD OF INSURANCE AND TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

TO SAID HONORABLE COURT:

NOW COME Beacon National Insurance Company and First Preferred Insurance Company, Plaintiffs herein, and present to the Court this their First Amended Original Petition complaining of State Board of Insurance of the State of Texas and the Texas Catastrophe Property Insurance Association, and for grounds would show to the Court the following:

1.

Plaintiffs, Beacon National Insurance Company and First Preferred Insurance Company (hereinafter sometimes called "Beacon Insurance Group"), are domestic insurance companies chartered and licensed by the State of Texas to do business in this state with principal offices in Wichita Falls, Wichita County, Texas. Defendant, State Board of Insurance is an agency of the State of Texas composed of Chairman, Joe Christie, Ned Price and Durwood Manford, and citation may be served upon this Defendant by serving the Chairman at the offices of the State Board of Insurance

at 1110 San Jacinto Street, Austin, Texas. Defendant, Texas Catastophe Property Insurance Association is a State agency and this agency may be served with citation by serving Mr. Oran F. Needham, Chairman of the Board of Directors of this Defendant, at the offices of said Defendant at 1110 San Jacinto, Austin, Texas.

2.

Plaintiffs would show to the Court that this action is brought under Article 21.49 of the Insurance Code of the State of Texas, Article 1.04f of the Insurance Code of the State of Texas and Article 6252-13a, V.A.T.S. Plaintiffs allege that they have complied with all prerequisites of the laws and are entitled to bring this suit as an appeal from the ruling of the Texas Catastrophe Property Insurance Association dated October 4, 1976, and from the action of the State Board of Insurance dated March 8, 1977, and April 5, 1977, refusing to grant the relief sought by Plaintiffs and affirming the action of the Texas Catastrophe Property Insurance Association. Plaintiffs attach hereto as exhibits the applications for relief made by Plaintiffs and the rulings by Defendants thereon, which exhibits are marked Exhibits A through I, respectively.

3.

Plaintiff sought relief from the Texas Catastrophe Property Insurance Association and the State Board of Insurance for revision of the plan of operation, rules, regulations and designation of Catastrophe Area so as to effect a more equitable and fair operation of the Plan for all member companies. The Texas Catastrophe Property Insurance Association was created by Article 21.49 of the Texas Insurance Code and under its authority all property insurance companies doing business in the State of Texas are assigned a percentage of the property insurance placed through the Association in accordance with the terms of the Act. The December 31, 1975, statement of participation assigned these Plaintiffs 1.666% share of the Catastrophe Pool risks while these Plaintiffs had only a .738% of the total premiums written in the state during the year 1975. For the year 1976, these figures were 1.783% of the Pool participation and .822% of the premiums written in the State. Plaintiffs would show to

the Court that the larger insurance companies are able to write voluntary insurance in the "Catastrophe Area" and receive dollar-for-dollar credit against their Pool participation. As a result, many of the largest insurance companies in the state are able to select their risks in the "Catastrophe Area" and eliminate their participation in the Catastrophe Pool. Smaller companies, such as Plaintiffs, have more difficulty in writing voluntary insurance in the "Catastrophe Area" because mortgage companies and other lenders refuse to accept policies written by many of the members of the Texas Catastrophe Property Insurance Association but instead give preference to the policies of the larger member insurance companies. Defendants have refused to decrease the dollar-for-dollar credit given for voluntary insurance premiums written in the "Catastrophe Area" even in those portions of the Catastrophe Area where property insurance is generally available and no necessity for Catastrophe Pool insurance exists. Also, the Defendants have refused to increase the credit given for voluntary insurance written in those areas of the "Catastrophe Area" where the bulk of the Catastrophe Pool insurance lies. In this connection, Plaintiffs would show to the Court that approximately 60% of the Catastrophe Pool insurance lies in two counties, Galveston and Brazoria Counties and only 10% in Nueces County, 4%-5% in Cameron County and 10% in Jefferson County. The "Catastrophe Area" consists of all of the counties in Texas bounded by the Gulf of Mexico. Defendants have refused to do anything to prevent the concentration of the Catastrophe Pool insurance in only two counties of the Catastrophe Area, although this concentration could be relieved by either adjusting the amount of credit given for writing voluntary insurance or by reducing the size of the "Catastrophe Area".

4.

Plaintiffs are suffering irreparable harm and damage since the Texas Catastrophe Property Insurance Association continues to place new policies of insurance with these Plaintiffs and all of the risks covered by these insurance policies are extra-hazardous and have been previously turned down by other insurers. As a result, Plaintiffs are being forced to ac-

cept extra-hazardous risks concentrated in one particular area so that if a hurricane or major catastrophe strikes the particular area, these Plaintiffs will suffer a proportionately far greater loss than other insurance companies doing business in the state which have been able to effectively eliminate their Catastrophe Pool participation. Plaintiffs therefore pray that a temporary injunction issue during the pendency of this suit enjoining Defendants from placing new or additional policies of insurance with these Plaintiffs and from taking any punitive measures against these Plaintiffs for obtaining such injunction and refusing such additional policies. Further, Plaintiffs pray that said temporary injunctions be made permanent upon final hearing hereof. Plaintiffs would further show to the Court that they have no adequate remedy at law to protect themselves and that they have exhausted all rights of appeal through the administrative channels of the Defendant agencies herein.

5.

Plaintiffs would further show to the Court that they have made an attempt to place insurance voluntarily in the Catastrophe Area but that they have been unable to do so to a sufficient degree to even maintain a Catastrophe Pool participation percentage equal to their statewide insurance premiums percentage. This is so even though Plaintiff, First Preferred Insurance Company, is a deviated rate company, offering a 20% deviation (or discount) from manual rates offered by most other insurance companies in the State of Texas. Although mortgage companies and other lenders refuse to accept the policies in many instances of these Plaintiffs, they will accept the policies when the insurance is placed through the Texas Catastrophe Property Insurance Association. Aside from the effect on these Plaintiffs, the effect on the policyholders in the Catastrophe Area is that they cannot obtain the deviated rates (or discounted rates) of up to 20% less than the manual rates offered by insurance companies such as First Preferred Insurance Company. Thus, the large insurance companies are able not only to select their risk within the Catastrophe Area but also to charge higher, non-competitive rates for their premiums in that area, and obtain dollar-for-dollar credit based on the manual rates

while companies such as First Preferred Insurance Company, charging only 80% of the manual rates, receive in effect, only 80% of the credit which the large insurance companies receive for writing the same business.

6.

In the alternative and without waiving the foregoing, Plaintiffs would show to the Court that Article 21.49 of the Texas Insurance Code is unfair and discriminatory in operation and, therefore, violative of both the Constitution of the State of Texas and the Constitution of the United States. In this connection, Plaintiffs say that in operation and effect, Article 21.49 of the Texas Insurance Code violates Article 1, Sections 3, 13, 16, 17 and 19 of the Texas Constitution and Article 1, Section 10, Amendment 5 and Amendment 14 of the United States Constitution. In support thereof, Plaintiffs would show to the Court that the Board of Directors authorized by Article 21.49 is composed of the larger insurance companies doing business in the State of Texas, that such board promulgated a "Plan of Operation" for the Texas Catastrophe Property Insurance Association, that in its operation many of the members of the Board have virtually a zero percentage of participation in the Catastrophe Pool, whereas, most of the smaller insurance companies, such as these Plaintiffs have a Pool participation more than double their statewide percentage. This is due largely to the fact that the large insurers can obtain credit against Pool participation based on their voluntary writings in the "catastrophe area" and, because of their size are able to pick and choose their risks within the "catastrophe area". The smaller insurance companies are not able to write insurance voluntarily in the "catastrophe area" because of both a limitation in the number of agencies available to them and the refusal of lenders to accept policies from smaller companies. Further, the Texas Catastrophe Property Insurance Association has permitted the Catastrophe Pool to be concentrated in two counties so that more than 60% of the Pool is located in Galveston and Brazoria counties. As a result, Plaintiffs are denied the opportunity to have any voice in directing the Association and are arbitrarily and discriminatorily assigned a percentage of the Pool participa-

tion more than twice their statewide percentage of insurance writings in order to make up the participation which the large insurers have not been required to assume. In addition, Plaintiffs' participation is concentrated in the two counties mentioned above and subjects them and other smaller insurance companies similarly situated to the extra hazard of sustaining an extraordinarily large loss in the event a large hurricane were to strike the Texas coast at Galveston and Brazoria counties. Defendants have refused to correct this situation and have continued to permit the larger insurers to enjoy the advantages unfairly granted to them by the Statute and the actions of the Board of Directors of the Texas Catastrophe Property Insurance Association.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that citation be issued and served on Defendants herein and that upon hearing Plaintiffs be granted the temporary relief prayed for above and that on final hearing hereof Plaintiffs' temporary injunctions be made permanent and Defendants' Orders denying Plaintiffs' pleas for relief be set aside in all things and that this Court enter its Order setting a more equitable basis for credits to be given for voluntary writings of insurance in the Catastrophe Area, resetting the boundaries of such Catastrophe Area or, alternatively, declaring Article 21.49, Texas Insurance Code, to be unconstitutional and void, and entering such other orders to which Plaintiffs may show themselves entitled, including costs of suit.

Respectfully submitted,

/s/ Joe E. Shaddock

Joe E. Shaddock
318 City National Building
Wichita Falls, Texas 76301

Attorney for Plaintiffs,
Beacon National Insurance Company and
First Preferred Insurance Company

STATE OF TEXAS
COUNTY OF WICHITA

BEFORE ME, the undersigned authority, on this day personally appeared Joe E. Shaddock, who, being by me duly sworn, on oath says that he is duly authorized to act for the Plaintiffs, Beacon National Insurance Company and First Preferred Insurance Company, in the above styled and numbered cause, that he is duly authorized to make this affidavit and that the foregoing plea and every statement, allegation and denial thereof are true.

/s/ Joe E. Shaddock
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME by the said Joe E. Shaddock, this 11th day of August, 1977, to certify which witness my hand and seal of office.

/s/ Diana Jackson
Notary Public in and for
Wichita County, Texas

APPENDIX - 7

NO. 260,154 - A
BEACON NATIONAL INSURANCE COMPANY, ET AL
VS.
STATE BOARD OF INSURANCE, ET AL

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

ORDER ON ADMINISTRATIVE APPEAL

By pretrial order previously entered in this cause, the Court held that Plaintiffs' petition stated two separate and divisible causes of action, one being an administrative appeal under Article 21.49 of the Texas Insurance Code, Article 1.04f of the Texas Insurance Code, and Article 6252-13a, V.A.T.S., and the other a suit to determine questions as to the constitutionality of the statute. The Court has also previously held that the administrative appeal portion of the suit is controlled by the Texas Register and Administrative Procedure Act, Article 6252-13a V.A.T.S. and subject to review under the Substantial Evidence Rule. The Court then severed the administrative appeal and the administrative appeal was submitted to the Court upon the basis of the record before the State Board of Insurance and the brief of the parties; and the Court having considered all material pertinent to that portion of the case and finding that the Order entered herein by the State Board of Insurance was not arbitrary, capricious or unreasonable but is instead reasonably supported by substantial evidence;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the administrative appeal filed by Plaintiffs, Beacon National Insurance Company and First Preferred Insurance Company, is hereby denied in all things as against Defendant, Texas State Board of Insurance and Texas

Catastrophe Property Insurance Association, and that Plaintiffs are entitled to no relief for the cause of action heretofore designated Phase I of this case.

ENTERED this 3rd day of October, 1978.

/s/ Harley Clark
Harley Clark
Judge Presiding